

HUMAN SERVICES DEPARTMENT[441]

Adopted and Filed

Rule making related to Medicaid payments to nursing facilities

The Human Services Department hereby amends Chapter 81, "Nursing Facilities," Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is adopted under the authority provided in Iowa Code section 249A.4.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code section 249A.4.

Purpose and Summary

The Department adopts these amendments in order to provide clarification on the treatment of depreciation when a change of nursing facility ownership occurs. The amendments clarify leasing arrangements, update the Iowa Medicaid Enterprise (IME) mailing address, and make changes to reflect current operations of IME.

Public Comment and Changes to Rule Making

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on November 6, 2019, as **ARC 4740C**. The Department received 34 comments from four respondents on the proposed amendments. A summary of the comments and the corresponding responses from the Department are as follows:

1. Four respondents asked about the intent of IME in changing the lease rule.

Department response: The Provider Cost Audit and Rate Setting Unit of the Department worked with IME policy staff and the Attorney General's office on the intent of the nursing facility leasing rule. It was determined that the rule should be updated to more clearly present the intent of the rule and clearly identify allowable lessor costs.

2. Two respondents asked whether IME can clearly identify acceptable sources for reporting landlord costs.

Department response: The amendments identify allowable landlord costs. Acceptable sources for these costs would be documentation that can be provided to support the amounts being reported.

3. Two respondents commented that there are specific examples where the landlord may not maintain information on a specific property when it is part of a larger group of properties. The respondents asked that additional information be provided on this topic in the provider manual.

Department response: The Department will make updates to the provider manual based on the rule change.

4. Three respondents asked whether the Department can provide an initial schedule or form for each of the respondents' clients impacted by this rule change and use historical data to populate the form.

Department response: The Department will not provide such a form because the Department does not have access to all historical data for providers.

5. Three respondents asked whether providers will be informed of amounts IME has determined to be allowable, and if so, on what date that information will be given to providers.

Department response: Providers are responsible for supporting cost information included on the financial and statistical report. If adjustments are made by IME to reimbursable costs, those adjustments will be sent to the provider for review, as is the current practice.

6. Two respondents commented that the historical basis only references depreciable fixed assets. The respondents asked if the value of the land or other assets can be used in the calculation.

Department response: The question seems to be related to the calculation of a Reasonable Rate of Return. Paragraph 81.6(11)“m” states “historical cost of the facility.” This can include land at its historical cost but would not include other assets.

7. Two respondents commented that in the past, some landlord companies have preferred to not provide their cost information directly to the tenant. The respondents asked if there has been consideration of a separate reporting procedure for the nonrelated party lessors to transmit their cost information to IME.

Department response: If a lessor does not provide the required information or does not support what is provided, the terms of cost should not be included as a reimbursable cost or can be removed from reimbursable cost by IME.

8. Three respondents commented about the verbiage used referring to “tax cost” and asked what the definition of “tax cost” is, what the impact of using tax cost would be, and whether there would be additional record-keeping requirements related to tax cost.

Department response: The use of the words “tax cost” in subrule 81.6(11) was not changed in this rule making, and there is no change to current usage. Tax cost is the historical cost of an asset, and depreciation is to be calculated based on the straight-line basis. Therefore, there is no impact on providers, and there are no additional schedules that need to be created.

9. One respondent asked whether, if there is no existing determination of the financial impact to providers, the Department will consider delaying the effective date until that calculation can be determined.

Department response: There have been no discussions on delaying the rule change.

10. One respondent commented on the area of reporting and that the providers potentially impacted have limited access to historical information that may be necessary to comply with the changes.

Department response: The analysis of the underlying information can be very complex and labor-intensive. The respondent asked whether the rule changes can be delayed until the specific providers are identified and the potential impact determined. There have been no discussions on delaying the rule making. If a provider has been through a change of ownership or leases the facility where services are provided, the provider may be impacted.

11. One respondent asked the Department to clarify how the treatment of depreciation will change following a change of ownership.

Department response: The treatment of depreciation following a change of ownership should not change. The asset cost basis and depreciation for assets purchased by the previous owner are carried forward to the new owner. The new owner has been limited to the previous owner’s cost basis in the asset (historical cost).

12. One respondent asked the Department to estimate how many providers could be impacted by the proposed rule changes.

Department response: If a provider has been through a change of ownership or leases the facility where services are provided, the provider may be impacted. Based on the FY 2018 financial and statistical reports, there were 146 providers that had some amount of lease expenses reported on Schedule C, line 87 (facility lease), column 1 (expenses per the general ledger). Some of these providers may be leasing space other than the facility where services are provided.

13. One respondent asked if the rule changes impact both related party leases and nonrelated party leases.

Department response: Both related party and nonrelated party leasing arrangements would be impacted.

14. One respondent asked what changes to the annual cost report would need to be implemented.

Department response: It is not anticipated that any changes to the financial and statistical report are necessary based solely on the amendments in this rule making.

15. One respondent asked what changes to the provider manual for cost reporting would be necessary.

Department response: The provider manual will be updated as a result of this rule making.

16. One respondent asked to have IME provide instructions detailing the information that would be required from the prior owner and the new owner based on these rule changes.

Department response: Providers are responsible for being able to support all cost information that is included on the financial and statistical report.

17. One respondent asked if the provisions in the rule making will apply to all providers, including those in other cost-based programs, and not just to leased facilities in the nursing facility program.

Department response: This rule making is only for the nursing facility program.

18. One respondent stated that the respondent's clients are concerned that the use of historical basis as a source of the calculation will not represent the full capital investment of the current property owners, especially those whose properties have undergone physical renovation.

Department response: Any depreciation on improvements or capital assets purchased by the lessor can be allowed depreciation. The cost basis of the items purchased through a change of ownership must be reported, and depreciation must be based on the historical cost of the program in the hands of the original owner when the facility entered the Medicaid program. This does not change with this rule making; however, providers should ensure that depreciation of capital assets that have changed hands through a change in ownership is reported this way.

19. One respondent asked if IME intends to send information or instructional letters limited to those providers that may be impacted by the rule change.

Department response: IME does not intend to send information or instructional letters to only those providers that are impacted. If a provider has been through a change of ownership or leases the facility where services are provided, the provider may be impacted. IME does intend to send a general informational letter about the rule change.

20. One respondent asked if IME is proposing a method or some type of forum for the affected landlords and facility operators to work together to develop a timeline of information-reporting for the calculation of provider payment rates.

Department response: A forum for affected landlords and providers has not been discussed. No changes from the Notice have been made.

Adoption of Rule Making

This rule making was adopted by the Council on Human Resources on January 8, 2020.

Fiscal Impact

Without having all of the lessors' financial data relating to ownership of the facilities in leasing arrangements and comparing to lease expenses being paid by the facilities, it would be impossible to determine what the impact of these rules would be on the facilities. However, given the scope of the change coupled with the fact that providers do not receive reimbursement at full cost through their per diem, the rule is expected to have a relatively minimal impact.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Department for a waiver of the discretionary provisions, if any, pursuant to rule 441—1.8(17A,217).

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee's

meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rule making will become effective on March 18, 2020.

The following rule-making actions are adopted:

ITEM 1. Amend subrule 81.6(6) as follows:

81.6(6) *Census of ~~public-assistance-recipients~~ Medicaid members.* Census figures of ~~public assistance-recipients~~ Medicaid members shall be obtained on the last day of the month ending the reporting period.

ITEM 2. Rescind paragraph **81.6(11)“j”** and adopt the following **new** paragraph in lieu thereof:

j. For financial and statistical reports received after March 18, 2020, the depreciation, as limited in this rule, may be included as an allowable patient cost.

(1) Limitation on calculation. Depreciation shall be calculated based on the tax cost using only the straight-line method of computation and recognizing the estimated useful life of the asset as defined in the most recent edition of the American Hospital Association Useful Life Guide.

(2) Limitation—full depreciation. Once an asset is fully depreciated, no further depreciation shall be claimed on that asset.

(3) Change of ownership. Depreciation is further limited by the limitations in subrule 81.6(12).

ITEM 3. Rescind paragraph **81.6(11)“m”** and adopt the following **new** paragraph in lieu thereof:

m. For financial and statistical reports received after March 18, 2020, the following definitions, calculations, and limitations shall be used to determine allowable rent expense on a cost report.

(1) Landlord's other expenses. Landlord's other expenses are limited to amortization, mortgage interest, property taxes unless claimed as a lessee expense, utilities paid by the landlord unless claimed as a lessee expense, property insurance, and building maintenance and repairs.

(2) Reasonable rate of return. Reasonable rate of return means the historical cost of the facility in the hands of the owner when the facility first entered the Medicaid program multiplied by the 30-year Treasury bond rate as reported by the Federal Reserve Board at the date of lease inception.

(3) Nonrelated party leases. When the operator of a participating facility rents from a party that is not a related party, as defined in paragraph 81.6(11)“l,” the allowable cost report rental expense shall be the lesser of:

1. Lessor's annual depreciation as identified in paragraph 81.6(11)“j” plus the landlord's other expenses, plus a reasonable rate of return; or

2. Actual rent payments.

(4) Related party leases. When the operator of a participating facility rents from a related party, as defined in paragraph 81.6(11)“l,” the allowable cost report rental expense shall be the lesser of:

1. Lessor's annual depreciation as identified in paragraph 81.6(11)“j” plus the landlord's other expenses; or

2. Actual rent payments.

ITEM 4. Amend subparagraph **81.6(16)“h”(5)** as follows:

(5) Submission of request. A facility shall submit a written request for the capital cost per diem instant relief add-on, the enhanced non-direct care rate component limit, or a preliminary evaluation of whether a project may qualify for additional reimbursement to the Iowa Medicaid Enterprise, Provider Cost Audit and Rate Setting Unit, ~~100 Army Post Road~~ P.O. Box 36450, Des Moines, Iowa 50315. A qualifying facility may request one or both types of additional reimbursement.

1. to 3. No change.

ITEM 5. Rescind paragraph **81.10(4)“h”** and adopt the following **new** paragraph in lieu thereof:

h. Ventilator patients.

(1) Definition. For purposes of this paragraph only, “ventilator patients” means Medicaid-eligible patients who, as determined by the quality improvement organization, require a ventilator at least six hours every day, are inappropriate for home care, and have medical needs that require skilled care.

(2) Reimbursement. In-state nursing facilities shall receive reimbursement for care of ventilator patients equal to the sum of the Medicare-certified hospital-based nursing facility rate plus the Medicare-certified hospital-based nursing facility non-direct care rate component as defined in subparagraph 81.6(16) “f”(3). Facilities may continue to receive this reimbursement at this rate for 30 days after a ventilator patient is weaned from a ventilator if, during the 30 days, the patient continues to reside in the facility and continues to meet skilled care criteria.

ITEM 6. Amend paragraph **81.10(5)“a”** as follows:

a. Supplies or services that the facility shall provide:

(1) Nursing services, social work services, activity programs, individual and group therapy, rehabilitation or habilitation programs provided by facility staff in order to carry out the plan of care for the resident.

(2) Services related to the nutrition, comfort, cleanliness and grooming of a resident as required under state licensure and Medicaid survey regulations.

(3) Medical equipment and supplies including wheelchairs except for customized wheelchairs for which separate payment may be made pursuant to ~~441—subparagraph 78.10(2) “a”(4), 441—paragraph 78.10(2) “d,”~~ medical supplies except for those listed in ~~441—paragraph 78.10(4) “b,”~~ oxygen except under circumstances specified in ~~441—paragraph 78.10(2) “a,”~~ and other items required in the facility-developed plan of care.

(4) Nonprescription drugs ordered by the physician. ~~except for those specified in 441—paragraph 78.1(2) “f.”~~

(5) Fees charged by medical professionals for services requested by the facility that do not meet criteria for direct Medicaid payment.

ITEM 7. Amend paragraph **81.13(5)“e”** as follows:

e. *Privacy and confidentiality.* The resident has the right to personal privacy and confidentiality of personal and clinical records.

(1) Personal privacy includes accommodations, medical treatment, ~~written and telephone communications,~~ personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident.

(2) The facility must respect the resident’s right to personal privacy, including the right to privacy in the resident’s oral (that is, spoken or sign language), written, and electronic communications.

~~(2) (3)~~ Except as provided in subparagraph ~~(3) (4)~~ below, the resident may approve or refuse the release of personal and clinical records to any person outside the facility.

~~(3) (4)~~ The resident’s right to refuse release of personal and clinical records does not apply ~~when the resident is transferred to another health care institution or record release is required by law.~~ to the following:

1. The release of personal and clinical records to a health care institution to which the resident is transferred; or

2. A record release that is required by law.

ITEM 8. Rescind paragraph **81.13(5)“i”** and adopt the following **new** paragraph in lieu thereof:

i. *Mail.* The resident has the right to send and receive mail, and to receive letters, packages and other materials delivered to the facility for the resident, whether delivered by a postal service or by other means, including the right to:

(1) Privacy of such communications consistent with this section; and

(2) Access to stationary, postage, and writing implements at the resident’s own expense.

ITEM 9. Adopt the following **new** paragraph **81.13(5)“q”**:

q. Electronic communication. The resident has the right to have reasonable access to and privacy in the resident’s use of electronic communications, including, but not limited to, email and video communications, and for Internet research:

- (1) If accessible to the facility;
- (2) At the resident’s expense, if any additional expense is incurred by the facility to provide such access to the resident; and
- (3) To the extent that such use may comply with state and federal law.

ITEM 10. Amend subparagraph **81.13(9)“b”(7)** as follows:

(7) Automated data processing requirement.

1. to 3. No change.

4. The facility must transmit MDS data in the ASCH format specified by CMS.

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EDITOR’S NOTE: For replacement pages for IAC, see IAC Supplement 2/12/20.